

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GREGORY WESTHOFF,

Plaintiff,

-against-

STEFANI MIOTTO and KELLY GREEHAN,

Defendants.

-----X

No. 08 Civ 4336

**NOTICE OF
MOTION TO
REMAND**

PLEASE TAKE NOTICE, that upon the Affirmation of Cheryl K. Beece, Esq. sworn to the 5th day of June, 2008, the annexed Memorandum of Law, the summons, complaint, and all the pleadings heretofore had herein, a motion will be made at a Civil term before district Court Judge William C. Conner of this Court, to be held in and for the Southern District of New York, at the Courthouse at 300 Quarropas Street, White Plains, New York, on the 24th day of June, 2008 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order remanding the action herein to the Supreme Court of the State of New York, County of Westchester, for the award of just costs and expenses, including attorneys' fees, and for such other and further relief as to the Court may seem just, proper, and equitable.

Dated: June 5, 2008
White Plains, NY

PARISI & PATTI, LLP

Cheryl K. Beece, Esq.
PARISI & PATTI, LLP
200 Mamaroneck Ave. Suite 602
White Plains, NY 10601
(914) 287-0201
Fax: (914) 287-7384

To:

Norman M. Block, Esq.
NORMAN M. BLOCK, P.C.
Attorneys for Defendant Miotto
245 Saw Mill River Road
Hawthorne, NY 10532
(914) 769-3100

Donald S. Campbell, Esq.
Danzig Fishman & Decea
Attorneys for Defendant Kelly Greehan
One North Broadway, Suite 1202
White Plains, NY 10601

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GREGORY WESTHOFF,

Plaintiff,

-against-

STEFANI MIOTTO and KELLY GREEHAN,

Defendants.

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No. 08 Civ 4336

**AFFIRMATION IN
SUPPORT OF
MOTION TO
REMAND**

CHERYL K. BEECE, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am an associate with the offices of Parisi & Patti, LLP, attorneys for Plaintiff herein, Gregory Westhoff (Westhoff). I am fully familiar with the facts and circumstances of the above entitled matter based on a review of the file maintained at our offices and discussions with Gregory Westhoff.

2. I make this Affirmation in support of Westhoff's motion to remand the case herein to the Supreme Court of the State of New York, County of Westchester.

3. This case was brought in the State of New York.

4. Title 28 of the United States Code (USC) provides under § 1441(b) that "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable **only** if **none** of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." (Emphasis added.)

5. This action is brought for false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, and prima

facie tort. None of these causes of actions represents a claim or right arising out of the Constitution, treaties or laws of the United States.

6. Defendant Miotto does not allege a claim or right arising out of the Constitution, treaties or laws of the United States.

7. Both Defendants in this case are residents of the State of New York, the same State in which this action is brought.

8. Therefore, pursuant to Title 28 of the USC, § 1441(b), this case should be remanded, where there is no Constitutional issue and where the diverse residence requirements are not met by the Defendants.

9. The removal from the Supreme Court of the State of New York was improper.

10. Pursuant to USC § 1447(c), Westhoff respectfully demands “payment of just costs and any actual expenses, including attorney’s fees, incurred as a result of the removal.”

WHEREFORE, Westhoff respectfully demands that the case herein be remanded to the Supreme Court of the State of New York, County of Westchester, that Westhoff be awarded just costs and expenses, including attorneys fees, and for such other and further relief as this Court deems to be just, equitable, and proper.

Dated: June 5, 2008
White Plains, NY

Cheryl K. Beece, Esq.
PARISI & PATTI, LLP
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Fax: (914) 287-7384

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GREGORY WESTHOFF,

No. 08 Civ 4336

Plaintiff,

-against-

**AFFIDAVIT
OF SERVICE**

STEFANI MIOTTO and KELLY GREEHAN,

Defendants.

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STATE OF NEW YORK)
)ss.
COUNTY OF WESTCHESTER)

Cheryl K. Beece, an attorney duly admitted to practice law before the courts of this State
hereby affirms as follows:

1. I am over the age of eighteen (18) years and not a party to the action.
2. On June 5, 2008, I served a true copy of the attached Notice of Motion to Remand
and Memorandum of Law by sending it overnight delivery, Federal Express, in a sealed
envelope, prepaid, pursuant to Local Civil Rule 5.3, addressed to the last known address of the
addressees as follows:

Norman M. Block, Esq.
NORMAN M. BLOCK, P.C.
Attorneys for Defendant Miotto
245 Saw Mill River Road
Hawthorne, NY 10532
(914) 769-3100

Donald S. Campbell, Esq.
Danzig Fishman & Decea
Attorneys for Defendant Kelly Greehan
One North Broadway, Suite 1202
White Plains, NY 10601

Dated: White Plains, NY
June 5, 2008

Cheryl K. Beece, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 08 Civ 4336

GREGORY WESTHOFF,

Plaintiff,

-against-

STEFANI MIOTTO and KELLY GREEHAN,

Defendants.

**NOTICE OF MOTION TO REMAND
AFFIRMATION IN SUPPORT OF MOTION TO REMAND**

PARISI AND PATTI, LLP
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Fax: (914) 287-7384

To: Norman M. Block, Esq.
NORMAN M. BLOCK, P.C.
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245 Saw Mill River Road
Hawthorne, NY 10532

Donald S. Campbell, Esq.
Danzig Fishman & Decea
Attorneys for Defendant Kelly Greehan
One North Broadway, Suite 1202
White Plains, NY 10601

Dated: June 5, 2008

The undersigned attorney certifies pursuant to 22 NYCRR 1301.1 that to the best of his/her knowledge, information and belief, the annexed document is not frivolous.

Cheryl K. Beece, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY WESTHOFF,

Plaintiff,

-against-

STEFANI MIOTTO and KELLY GREEHAN,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S NOTICE OF MOTION TO REMAND**

PARISI & PATTI, LLP
200 Mamaroneck Ave. Suite 602
White Plains, NY 10601
(914) 287-0201
Fax: (914) 287-7384

PRELIMINARY STATEMENT

Plaintiff Gregory Westhoff (Westhoff) respectfully submits this Memorandum of Law in support of the Notice of Motion to Remand, on the grounds that pursuant to Title 28 of the USC, § 1441(b) the action herein should be remanded to the Supreme Court of the State of New York in the County of Westchester and that the removal herein was improper, allowing the award of Attorneys' fees to Westhoff pursuant to USC § 1447(c),

STATEMENT OF FACTS

Plaintiff Westhoff was employed as a teacher at the Saunders Trades and Technical High School (Saunders) in the City of Yonkers, State of New York for the 2005-2006 school year. Defendants Stefani Miotto and Kelly Greehan (Defendants) were students at that school, but did not have Westhoff as an assigned teacher. As a result of allegations made by Defendants in or about June of 2006, multiple misdemeanor informations were filed against Westhoff. Ultimately, on or about May 18, 2007, a superseding misdemeanor information was filed against Plaintiff Westhoff by a member of the Yonkers Police Department, alleging one count of endangering the welfare of a child, two counts of stalking in the fourth degree, two counts of sexual abuse in the third degree, and two counts of harassment in the second degree. Westhoff was acquitted of all charges on or about March 6, 2008.

ARGUMENT

I. The Action Herein Should be Remanded on the Ground that Defendants herein Lack the Required Diversity between their State of Residence and the State wherein the Action was Brought

When a plaintiff files in state court a civil action over which the federal district courts would have original jurisdiction based on diversity of citizenship, the defendants or defendants may remove the action to federal court, provided that no defendant is a citizen of the state in which the action was brought. *Catepillar Inc v Lewis*, 117 S. Ct. 467, 519 U.S. 61 on remand 156 F.3d 1230; *McKay by and through McKay v. Boyd Construction Co. Inc.*, 769 F.2d 1084.

Actions involving no federal question can not be removed to federal court if any defendant is a resident of the forum state. *Day v. Avery*, 548 F.2d 1018.

CONCLUSION

As there is no constitutional question before the Court, and as the Defendants reside within the State in which the action is brought and thus fail to meet the diversity of residence requirement, the action herein should be remanded to the Supreme Court of the State of New York, County of Westchester, pursuant to Title 28 of the USC, § 1441(b).

Cheryl K. Beece, Esq.

Dated: White Plains, New York
June 5, 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NOTICE OF MOTION TO REMAND**

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One North Broadway, Suite 1202
White Plains, NY 10601

Dated: June 5, 2008

The undersigned attorney certifies pursuant to 22 NYCRR 1301.1 that to the best of his/her knowledge, information and belief, the annexed document is not frivolous.

Cheryl K. Beece, Esq.